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OCTOBER TERM, 1956

NO. 408

PAN-ATLANTIC STEAMSHIP CORPORATION,
APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
ET AL., APPELLEES

NO. 424

INTERSTATE COMMERCE COMMISSION,
APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
ET AL., APPELLEES

On Appeal From The United States District Court For The District of Massachusetts

BRIEF FOR THE PLAINTIFF-APPELLEES

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Dated: March 26, 1957

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STATEMENT OF THE CASE

The plaintiffs below filed a verified complaint which alleged in substance the following facts (R. 3-9): They are interstate carriers by railroad in the eastern and south eastern part of the United States which handle transcontinental passenger and freight traffic between the Country's east and west coasts in connection with other rail carriers. Pan-Atlantic Steamship Corporation, an interstate water carrier of freight and passengers along the east and Gulf coasts, was authorized on May 18, 1955 by the Interstate Commerce Commission, hereinafter sometimes called the Commission, to carry freight and passengers between certain east and west coast ports. This authorization issued without hearing under the provisions of section 311(a) of the Interstate Commerce Act, 49 U.S.C.A., 911(a) and was good for a term of only 180 days. (Exhibit 12, R. 9.) This license authorized carrier operations commercially competitive with those of plaintiffs which, at the time the complaint was filed, had already caused plaintiffs to lose revenues they otherwise could have earned and which had rendered partially unproductive plaintiff's investment in transportation facilities and equipment. On October 28, 1955 the Commission extended Pan-Atlantic's temporary intercoastal license, again without hearing, by lifting the 180 day restriction and making it good during the pendency of a formal application by Pan-Atlantic for an intercoastal certificate of public convenience and necessity filed May 5, 1955. (Exhibit 17, R. 14-15) This application had not been decided when the complaint was filed and the administrative process required to decide it is such that it is not likely to culminate for several years from May 5, 1957. The complaint contained the contention that,

> "15. The Commission's order of May 18, 1955 granting temporary authority to Pan-Atlantic, Exhibit 12, and the Commission's order of October 28, 1955 authorizing Pan-Atlantic to continue to perform the water carrier service previously authorized by said tem-

porary authority, Exhibit 17, together constitute a grant of temporary authority which has been, is and will be valid for more than an aggregate of 180 days.

"16. A grant by the Commission of temporary authority valid for more than an aggregate of 180 days is contrary to the provisions of section 311(a) of the Interstate Commerce Act; 49 U.S.C.A. 911(a) and is therefore unlawful, arbitrary and capricious." (R. 7)

In consequence the complaint asked that the Commission's order of October 28, 1955 be set aside. (R. 8)

The complaint impleaded the United States as defendant, and the Commission and Pan-Atlantic both intervened as defendants. (R. 19-20) The plaintiffs below moved for summary judgment on their verified complaint (R. 27), and Pan-Atlantic did so as well. (R. 28) The only verified pleading in the case being the complaint, and there having been filed no counteraffidavits by the defendants, the allegations of the complaint constitute the admitted facts on the basis of which the case was amenable to final judgment.

There is no evidence of record that any application for an intercoastal license filed with the Commission by Pan-Atlantic was responsive to any urgent or immediate need for intercoastal service. The Commission made a finding, on the basis of undisclosed information, that such a need existed on May 18, 1955. (Exhibit 12, R. 9) On October 28, 1955 the Commission made a finding, again on the basis of undisclosed information, that "a public need for continuance of" Pan-Atlantic's intercoastal service existed, but made no finding at that time that any urgent or immediate need existed. (Exhibit 17, R. 14)

The Commission's findings concerning Pan-Atlantic's application for an intercoastal certificate of public convenience and necessity filed May 5, 1955 did not include a finding that

the service being provided by Pan-Atlantic under its temporary license "was contained within the scope of" that application. The Commission did find on October 28, 1955 that the temporarily licensed service "corresponds in part with that" sought by the May 5, 1955 application. (Exhibit 17, R. 14)

The plaintiffs having exhausted their administrative remedy (R. 6-7), on the basis of these facts the District Court granted judgment for the Plaintiffs and ordered set aside the Commission's order of October 28, 1955 (Exhibit 17, R. 14) extending Pan-Atlantic's temporary license (Exhibit 12, R. 9) beyond the 180 days for which it had been granted originally. (R. 32-33) In a concurring opinion District Judges Wyzanski and Ford stated that, had not the District Court previously decided the same question adversely to the Commission in *Stone's Express* v. *United States*, 122 F.Supp. 955 (1954), these two judges would refuse to vacate the Commission's order of extension. Circuit Judge Magruder did not join in these views.

After obtaining an order staying judgment, unopposed by plaintiffs (R. 36), the Commission and Pan-Atlantic took these appeals (R. 37-41).

The basis for the judgment of the court below was that only section 311(a) of the Interstate Commerce Act, 49 U.S.C.A., sec. 911(a), authorized the Commission to issue temporary water carrier licenses without a hearing, and that statute contains the limiting words, "such temporary authority shall be valid * * * not for more than an aggregate of one hundred and eighty days * * *."

The basis for appeal is in substance that the third sentence of section 9(b) of the Administrative Procedure Act, 5 U.S.C.A., sec. 1008(b) prohibits the expiration of agency licenses with reference to activity of a continuing nature

during the pendency of the application, "in any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license."

It is of interest to note that the temporary license here sought to be vacated is good only during the pendency of another licensing proceeding now before the Commission. When that proceeding, Docket W-376 Sub-13, has been concluded by a final order either granting or denying the intercoastal certificate therein sought, the subject temporary license will by its terms expire. In that event this appeal and this case will become moot. *Eastern Airlines* v. *Civil Aeronautics Board*, 341 U.S. 901, 95 L. ed. 1341. Dismissal for mootness was the ultimate fate of the complaint in *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 350 U.S. 906, 100 L. ed. 795 (1955). It is apparent therefore that, arguable and substantial as may be the question whether the Commission has the power to extend temporary licenses beyond 180 days and during the pendency of applications for permanent licenses, it is a question extraordinarily difficult to preserve for decision before this Court. This consideration very likely accounts for the paucity of precedent on the issue.

SUMMARY OF ARGUMENT

Pan-Atlantic's activity as an intercoastal water carrier which this case seeks to end is prohibited by section 309 of the Interstate Commerce Act except in two circumstances. The first is that Pan-Atlantic obtain a certificate of public convenience and necessity from the Commission. This cannot be done over competitors' protests unless after a formal hearing at which competitors are able to present evidence concerning their own and the public's interest, and such a certificate cannot issue unless on the basis of adequate findings that a public need exists and that existing carriers will not be unduly harmed to the detriment of the public interest. Such findings must be based on substantial evidence.

The only other basis upon which Pan-Atlantic can provide intercoastal service is to obtain a temporary license or "authority," as it is called, under section 311(a) of the Interstate Commerce Act. Section 311(a) forbids such license to be valid for more than "an aggregate of one hundred and eighty days." This complaint was brought after Pan-Atlantic had obtained such a temporary license, after 180 days had expired, after Pan-Atlantic had applied for a permanent intercoastal certificate under section 309 of the Interstate Commerce Act, and after the Commission had extended Pan-Atlantic's temporary intercoastal license for the duration of the pendency of its application for permanent certificate.

Because the exercise of such temporary licenses over periods in excess of one year can be as irretrievably harmful competitively as the improvident issuance of permanent certificates, the plaintiffs have objected to the Commission's extension of Pan-Atlantic's temporary license beyond the six month statutory period. The Commission's reply is that the third sentence of section 9(b) of the Administrative Procedure Act empowers a postponement of Pan-Atlantic's 180 day license until a final order has issued in the certification proceeding.

This is not true firstly because the Administrative Procedure Act provides no basis by which to determine what sort of permanent certificate application will postpone expiration of a temporary license. Inasmuch as the Administrative Procedure Act suspends license expiration by operation of law there is no room for agency regulations or exercise of agency discretion to supply such a basis. Unless the pending application seeks the same license presently being exercised by the licensee, the third sentence of section 9(b) of the Administrative Procedure Act should not be construed to postpone expiration of the existing license because of the chaotic regulatory condition which otherwise would result.

Pan-Atlantic's temporary intercoastal license is quite different from the permanent certificate it seeks because it issues after adjudication, with due consideration given to competitors' interests and is not within the Commission's power to terminate over Pan-Atlantic's objection. *United States* v. *Seatrain Lines*, 329 U.S. 424.

Secondly the Administrative Procedure Act, section 9(b), third sentence does not affect temporary licenses during the pendency of permanent licensing proceedings because the legislative history of section 9(b) indicates that Congress in 1946 attempted to achieve by it a result the same as that produced by the Ohio Administrative Procedure Act. The Ohio legislation in 1943 was not applicable except during the pendency of an application filed by a licensee who was such at the time he filed the application. Pan-Atlantic was not a licensee when it filed its application for a permanent certificate; it became one afterwards. And it required that in order for an application to suspend expiration of an existing license, the application had to be one for a license of the same "type" or "class." As stated above a temporary and a permanent I.C.C. carrier license are not licenses of the same type or class. The pattern both of the Federal and the Ohio acts indicate they are aimed at postponement of license expirations during the pendency only of renewal license applications, and that this is the reason for the more specific language used in the Ohio legislation.

Not only does Pan-Atlantic have pending no application for renewal of its temporary intercoastal license, but there is indication in the legislative history of the portions of the Interstate Commerce Act which enable temporary licensing, sections 210a and 311, that Congress in enacting them relied on the proposition that such temporary licenses would be good only for six months. That six-month period should not be extended until unduly harmful competitive effects had

been guarded against by legislation which it is not within this Court's power to enact. Precautions to this end could include a mandatorily preferred position on the Commission's docket of proceedings ancillary to temporary licensing, and mandatory investigation and hearing procedures to be followed prior to extending temporary licenses, perhaps based on relatively short orders of notice and limited rights of appeal and court review.

ARGUMENT

This case arises because Pan-Atlantic Steamship Corporation is engaging in intercoastal operations without a certificate of public convenience and necessity from the Interstate Commerce Commission authorizing such activity. It is very important that interstate carriers by motor and by water refrain from carrier operations not authorized by certificates, because, as is explained in detail *infra*, non-certificated activity is competitively destructive in a closely regulated area of private enterprise. Because the transportation market is thus regulated under the Interstate Commerce Act and is not a free one, the entry into it of an additional carrier with a large capital investment can have a profound effect on the revenues of carriers already in the market and eventually can destroy some of them, to the ultimate detriment of the public interest. Before issuing water carrier certificates of public convenience and necessity under section 309 of the Interstate Commerce Act, 49 U.S.C.A., sec. 909, and motor carrier certificates under section 207, 49 U.S.C.A., it is the Interstate Commerce Commission's practice and policy to make sure that the operations to be authorized will not produce the destructive effects described above. And the method by which the Commission obtains such assurance is to assign protested certification applications for formal hearing, to invite adversary evidence from competitors by pub-

lishing notice of such applications in the Federal Register, *e.g.*, 49 C.F.R., secs. 1.240 and 1.241, and to publish reports recommended by hearing examiners prior to final decision.

On May 18, 1955 Pan-Atlantic was licensed to conduct an intercoastal operation by a licensing procedure which was not attended by any of these safeguards. It was given a license issuable by an *ex parte* and summary procedure under section 311(a) of the Interstate Commerce Act, 49 U.S.C.A., sec. 911 (a); termed a "temporary authority." As is explained more fully hereinafter that section was enacted by the Congress in exactly the same terms and circumstances that caused section 210a(a) of the Interstate Commerce Act, 49 U.S. C.A., sec. 310a(a) to be enacted concerning motor carrier temporary authorities, and in adopting section 210a(a) of the act the Congress had reason substantially to rely on a representation made to it several times by Commissioner Eastman that such temporary authorities could not extend beyond 180 days. In conformity with the statute, Pan-Atlantic's temporary authority which issued May 18, 1955 recited that it expired in 180 days, *i.e.*, on November 14, 1955. It is the appellees' vigorous contention that the only reason the Congress permitted the issuance of licenses under sections 210a and 311 of the Interstate Commerce Act by summary and *ex parte* procedures which, nonetheless, could seriously alter competitive relationships in the carrier area of enterprise subject to regulation, was the Congress' belief that such alterations would not occur in the six months or less to which such licenses would be limited.

Today, March 26, 1957, Pan-Atlantic's intercoastal license has been outstanding not for six months as prescribed by the uncontestably and concededly plain terms of the statute under which it issued, but for more than twenty-two months and, were it not for the judgment below, that license could reasonably be expected to remain outstanding for as long as

three and one-half to four years. This is true because on October 28, 1955 the Commission extended that temporary license for the duration of a certification proceeding concerning Pan-Atlantic's application for an intercoastal certificate under section 309 of the act, 49 U.S.C.A., sec. 909. To justify this action the Commission has cited a statute which has nothing to do with temporary licensing of the sort enabled by section 311 of the Interstate Commerce Act, and has attempted to endow that statute with a construction which is unwarranted, distorted and, most important, disastrously destructive of the regulatory scheme of the Interstate Commerce Act and other statutes empowering federal agencies to regulate the conduct of industries in interstate commerce. That statute is the third sentence of section 9(b) of the Administrative Procedure Act and, while the burden of this brief must be addressed to the meaning of that statute, the appellees ask that the tortuous and surprising meaning which appellants seek to assign to this sentence be weighed throughout in the balance with the clear and unequivocal words of section 311(a) of the Interstate Commerce Act:

> "Such temporary authority shall be valid for such time as the Commission shall specify *but not for more than an aggregate of one hundred and eighty days.* * * *."

I. Section 9(b) of the Administrative Procedure Act was enacted contemporaneously with the enactment of the Ohio Administrative Procedure Act containing provision similar to section 9(b)'s third sentence.

This case requires decision concerning the meaning of the third sentence of section 9(b) of the Administrative Procedure Act, 5 U.S.C.A., Sec. 1008 (b). The sentence reads:

> "* * * In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for renewal or a new license, no license with

reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

This statute's legislative history explains that it is similar to a provision "in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154-167 [sic] of the General Code; Amended Substitute Senate Bill No. 36.)" *Legislative History—Administrative Procedure Act*, p. 35, Senate Document No. 248, 79th Congress, 2nd Session. The laws of Ohio for 1943 and 1944, Volume 120, page 361 contain the following enactment:

"No licensee shall be required to discontinue the operation of a business or profession because of the failure of an agency to accept or reject said licensee's application for a new license of the same type or class, or renewal of an existing license, or application for registration, prior to the expiration of the license *held by said licensee at the time said application was made* where said application was filed with the agency within the time and in the manner provided by statute or rule of the agency." (Amended Substitute Senate Bill No. 36, enacting the Ohio Administrative Procedure Act, May 20, 1943, 120 Ohio Laws, pp. 358-405).

On June 28, 1945, this language in the Ohio code was amended, see Laws of Ohio, Vol. 121, pp. 578-582, and see Page's Ohio Revised Code Annotated, Title 1, sec. 119.06:

"* * * *Where periodic registration of licenses or renewal of licenses is required by law,* a licensee who has filed his application for registration or renewal within the time and in the manner provided by statute or rule of the agency, shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on his application. Action of an agency rejecting any such application shall not be effective prior to 15 days after notice of the rejection is mailed to the licensee."

Both appellants, rather summarily we believe, suggest that if the United States Congress had desired to enact a statute the effect of which would be the same as that of the Ohio enactment of 1943 presumably Congress would have used the language used by the Ohio legislature. (I.C.C. Brief, p. 25; Pan-Atlantic Brief, p. 19)

However that may be, it is thought the Court should have the opportunity to review the three legislative statements of much the same sort of statutory enactment because, regardless of what the "intent of the legislature" was in each instance, these three bits of legislative language indicate the possible existence of a *single* overall goal to be sought by legislation, and the extent and shape of the semantic boundaries within which language can reasonably be drafted to achieve it. It is readily conceded that the three examples of draftsmanship quoted above are not characterized by equal degrees of precision.

A. The Ohio Administrative Procedure Act suspends license expirations only during the pendency of an application to renew an existing license.

The two Ohio statutes prohibit the "requiring" of a "licensee" to "discontinue a business or profession." The first version referred to discontinuance of the "operation" of a business or profession, and the second to discontinuance of a "licensed" business or profession. The federal statute forbids a "license to expire." Thus the Ohio statutes address themselves to the exercise of a privilege, and the federal statute is concerned with the existence of the privilege. However, in each case it is the same sort of privilege because the federal license is described as one "with reference to an activity of a continuing nature," which, while broader, is the same sort of activity as "operation of a licensed business

or profession."* To this point the three statutes do not differ materially; one may be more precise and another more succint, but the ultimate purpose underlying them is so clear that constructions which would cause their applicability to vary would appear unwarranted.

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* The Interstate Commerce Commission would appear to err in its belief that it may form a sort of value judgment as to whether the activity involved is one of a "continuing nature." See the Commission's brief, p. 11:

> "Where the evidence indicates an immediate and urgent need for a definite period which is less than 180 days, the Commission grants temporary authority for the period of the need and the operation is not regarded as of a continuing nature beyond that period, within the meaning of section 9(b)."

And see Title 49, Part 2 of the Commission's regulations, section 2.2(e), the Commission's brief, p. 36:

> "(e) *Need* [sic] considered not to be of a continuing nature. Any *need* which is the *basis* of an operation authorized by a temporary authority or approval to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a 'continuing nature' unless the Commission otherwise expressly determines."

Prior to its amendment on September 16, 1954, that regulation, as originally enacted by the Commission's order of July 6, 1948, read:

> "(c) An *operation* authorized by a temporary authority or approval to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a 'continuing nature' unless the Commission otherwise expressly determines."

Activity of a "non-continuing" nature would be such that, if the expiration of the license to engage in it were suspended, the licensee could present a *fait accompli*. For example, if the license involved were one to erect a structure, dig a ditch or consummate a financial transaction within a stipulated period of time, and if that time were extended by operation of law pending application for a renewal license, the renewal application would become moot if the original license were exercised within the extension period.

It is perhaps questionable whether the policy decision to contest this appeal would have been made by the Commission if it were understood that activity of a "non-continuing nature" is a concept of narrower scope than that entertained by the Commission. For this reason the Commission finds itself at odds with its co-appellant, Pan-Atlantic, who says at page 29 of its brief:

> "That action (by the Commission in extending temporary authorities) is an extension of the temporary license *by operation of law* (section 9(b)), and *not by operation of discretionary authority vested in the Commission.*"

As well as requiring that the privilege preserved from expiration be one with reference to activity of a continuing nature or with reference to operation of a profession or business, do these statutes impose a further limitation on the scope of their applicability? The present Ohio statute is quite clear about the matter; it is restricted to licenses which "by law" must be "periodically registered or renewed." The prior Ohio statute of 1943 used more words to achieve the same result with less precision. It was limited to licenses which could be supplanted by "a new license of the same type or class," to licenses which could be "renewed" and to licensed privileges which could be exercised only when the identity of the licensee and his intent to continue exercise of the licensed privilege was, at stated intervals, "registered" with the issuing agency. The 1943 Ohio statute was thus limited because the expiration of licensed privileges was suspended only when an application for a "new" or "renewal" license or for such a "registration" had been filed.

The federal statute sets forth no such explicit limitation, because it is effective when there is application for a "new license," and the "new license" is not limited to one "of the same type or class" as the existing license, the expiration of which is suspended by the statute. None-the-less is there reason to believe it is thus limited?

B. The Federal Act suspends agency license expirations during the pendency of a licensing application only when the application was filed subsequent to the issuance of the license preserved from expiration.

To answer this question it is useful to bear in mind the entirety of section 9(b) of the Administrative Procedure Act, 5 U.S.C.A., sec. 1108 (b). The first sentence requires the agency to reach its decision on whether to grant a license "required by law" with "reasonable dispatch" and "with due

regard to the rights or privileges of all the interested parties or adversely affected persons."

> "In any case in which application is made for a license required by law the agency, with due regard to rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision."

This sentence, then, is addressed to the initial posture of a licensing situation, when there is as yet no "licensee" in existence, and when someone possessing merely the status of "applicant" is asking agency relief. For applicant's benefit the sentence requires "reasonable dispatch" from the agency; in the public interest the agency is required to entertain the application "with due regard" to the interests of applicant's competitors and patrons.

The second sentence (with reasonable exceptions) prohibits the agency from cancelling a license for cause unless first the licensee has been given an opportunity to comply with "all lawful requirements."

> "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

The second sentence of course presumes that the initial stages of the licensing situation are over, and that there is a licensee in existence, because it is concerned solely with limitations

on the agency's powers to take his license away from him. The next and final area to be dealt with is the period when the license terminates by its own terms. The third and final sentence of section 9(b) addresses itself to this period with the initial words:

> "In any case in which *the* licensee *has*, in accordance with agency rules, made timely and sufficient application for a renewal or a new license * * *."

In this context, and placed as they are at the physical and chronological end of a statutory review of the licensing process, the words "*the* licensee" imply to the usual reader, hence to the usual drafter, that the enacting legislative assembly had in mind "the licensee *who has already been licensed, as discussed above.*" Ordinarily a great deal should not turn on the drafter's choice between the definite and indefinite article, but in this context the suggestion is most persuasive that "the" licensee was spoken of in the third sentence of section 9(b) because the statute is dealing with "the same" licensee whose affairs have evolved under the foregoing provisions of the first two sentences of that section.

With these considerations in mind the statement by the Senate Committee on the Judiciary concerning section 9(b)'s third sentence is rather significant:

> "A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1, amending sec. 154-167 (154-67?) of the General Code; Amended Substitute Senate Bill No. 36.)"
>
> (*Legislative History—Administrative Procedure Act*, 79th Cong., 2nd Sess., S. Doc. No. 248, p. 35)

That was the Ohio statute of 1943 which, it will be recalled, prohibited expiration only of licenses "held by said licensee at the time said application was made." The United States

Congress was warranted in assuming that the third sentence of a three-sentence statute would be read as referring to renewal applications filed by existing licensees when the first two sentences dealt with issuance and withdrawal of licenses, and when the committee report indicated the legislative belief that this third sentence achieved something similar to state legislation the effect of which was confined to applications filed by existing licensees.

Possibly with this sort of analysis in mind, the United States District Court for the District of Massachusetts, in deciding *Stone's Express* v. *United States*, 122 F.Supp. 955, 957-8 (1954) said:

> "The Third sentence of section 9(b), however, in using the words 'In any case in which the *licensee* has * * * made timely and sufficient application for a renewal or a new license, * * *' indicates that the statute presupposes at the time of the filing of the application the existence of a licensee. (Italics ours). The language of the statute thus clearly reveals that it was designed to prevent a license in existence at the time of the filing of the application for a renewal or a new license from terminating until the agency has finally determined whether or not to grant the renewal of the new license."

As was true of the applicant for license in the *Stone's Express* case, Pan-Atlantic in the case at bar was not on May 5, 1955, a licensee when it filed its application for a permanent intercoastal license to succeed the 180 day intercoastal license which it had originally received (R. 4, par. 6; R. 6, par. 8).

C. The purpose underlying the Federal requirement that the existing license have issued prior to the filing of the successor application is the same as that expressed by the Ohio act, namely to postpone agency license expirations only during the pendency of renewal applications.

Why should it have made any difference to the Congress whether the third sentence of section 9(b) was triggered into effect only when an application was filed by a licensee? Why would not the legislative purpose be served just as well by prohibiting license expiration whenever, regardless of the circumstances, there was pending an application for a successor license? The answer must be that situations "where periodic registration of licenses or renewal of licenses is required by law" (the later, 1945, Ohio statute) provide no occasion for the simultaneous pendency of two undecided applications by the same applicant for the same license. By excluding situations where the applicant for a "renewal" or a "new" successor license had not yet received his initial license, the Congress believed it was confining the prohibitive effect of the third sentence of section 9(b) to license-renewals.

Evidently the Ohio legislature, two years after it had used language to the same effect in 1943, noticed that, while it served the desired purpose in a situation such as that of Pan-Atlantic's in the case at bar, the 1943 Ohio statute could conceivably be interpreted more broadly to include an application, even though filed by a licensee, who was seeking not a renewal or a supplanting "new license" but rather a license of a different type covering the same activity. True, the 1943 Ohio statute had no effect unless there was filed an application "for a new license of the same type or class," but that language left room for argument and litigation concerning the boundaries of "types" and "classes" of licenses. So the 1945 Ohio amendment stated what was desired with greater precision. It is true that the United States Congress has not given the matter further attention in contradistinction to the action of the Ohio legislature. However, as is discussed below, importance attached to what Congress has not done can put a Janus-faced visage on this matter.

Therefore at this point in the legislative evolution of section 9(b) it appears that the Congress may reasonably be deemed to have aimed the third sentence of that enactment at "periodic registration or renewal of licenses."

> "The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license."
>
> Report of Senate Committee on the Judiciary, *Legislative History—Administrative Procedure Act*, 79th Cong,. 2nd Sess., S. Doc. No. 248, p. 35.

At the most it might be said that that aim was, not wide of the mark, but a little broader than the mark if the statute can be said to include applications by a temporary licensee for a permanent license. But the report writer for the Senate Committee, at least, was sure that the third sentence dealt with renewals, hence with applications filed by a licensee who already had a license for the renewal of which to apply.

The rather extensive analysis of the two Ohio statutes and comparison of them with the federal statute set forth above is not meant at all to suggest that they are any sort of "precedent" for a proper interpretation of the Administrative Procedure Act. Nor can the Ohio act of 1945 in any way fairly be said to have been within the contemplation of the Congress when the Administrative Procedure Act was enacted on June 11, 1946, because the Senate Committee report refers only to the Ohio Act of 1943 and not to that of 1945. Indeed, had the Congress been aware of what the Ohio legislature did in 1945, it is very possible that the language of section 9(b) would have congealed in a form somewhat more precise than that before the court today.

This Ohio legislation is useful, however, as a sort of case study of an attempt to shape statutory language to a given

end. If it be assumed—and the Senate Committee Report's statement quoted above warrants the assumption—that the two legislative assemblies had much the same goal and underlying purpose in mind, then the ultimate refinement of the Ohio language is a useful guide to a purposeful interpretation of the present federal statute. To accept appellant's suggestion (I.C.C. Brief, p. 25, Pan-Atlantic's Brief, p. 19) that, because the Congress did not adopt the exact language of the Ohio 1943 statute, it intended something different from what was achieved by the Ohio legislation would no doubt be a facile but, in our view, not a very faithful disposition of the matter.

II. The difference between permanent and temporary licenses under Parts II and III of the Interstate Commerce Act:

The foregoing review of the Administrative Procedure Act is in point because on May 18, 1955, the Interstate Commerce Commission issued to Pan-Atlantic Steamship Corporation (applicant licensee before the Commission, intervening defendant below, appellant here) a license to carry by water between points on the east and west coasts of the United States—a so-called intercoastal certificate. This certificate was good for only 180 days (R. 9-10). On October 28, 1955, without a hearing, the Commission extended the duration of this certificate beyond 180 days until a final decision had been reached on an application filed by Pan-Atlantic for a permanent intercoastal certificate (R. 14-15).

A. Permanent licenses are issued only after an agency hearing which must meet the requirements of sections 5 and 7 of the Administrative Procedure Act.

The carrier operations involved are prohibited by section 309(a), of the Interstate Commerce Act, 49 U.S.C.A., sec. 909(a),

> "* * * unless (the carrier engaging in such operations) holds a certificate of public convenience and necessity issued by the Commission."

Section 309(c) of the act, 49 U.S.C.A., sec. 909(c), empowers the Commission to issue such a certificate only if it finds that

> "* * * the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity * * *."

Furthermore, these findings, at least when they are contested, must be made on the basis of information gathered at adjudication hearings as provided in sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C.A., secs. 1004, 1006. *Pinkett* v. *United States*, 105 F.Supp. 67 (D., Md., 1952), construing *Riss & Co.* v. *United States*, 341 U.S. 907, 95 L.ed. 1345 (1951) and *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 94 L.ed. 616 (1950). Although *Pinkett* relied in part on *L. A. Tucker Truck Lines* v. *United States*, 100 F.Supp. 432 (E. D., Mo., 1951), which was reversed *sub nom. United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 97 L.ed. 54 (1952), it is clear that that reversal had nothing to do with the principle for which *Pinkett* is cited above. *Monumental Motor Tours* v. *United States*, 110 F.Supp. 929 (D., Md., 1953).

Thus before certificates may issue under section 309 persons with interests adverse to applicants must be notified of the time and place of hearings, and hearings must be fixed for times and places with due regard to the convenience and necessity of the parties. Administrative Procedure Act, Sec-

tion 5(a), 5 U.S.C.A., sec. 1004(a). Opportunity must be afforded all interested persons to submit facts and argument at the hearing, section 5(b), requests for findings, and exceptions to recommended reports and orders, section 8(b), 5 U.S.C.A., sec. 1007(b). Every party has the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct cross-examination. Section 7(c) of the Administrative Procedure Act, 5 U.S.C.A., sec. 1006(c).

B. Temporary licenses are issuable *ex parte* and on the basis of findings different from those needed to justify a permanent license.

This can be a time-consuming process. Therefore to cope with an "immediate and urgent need" for transportation services a carrier is relieved of the prohibition in section 309(a) in the Interstate Commerce Act quoted above if the Commission is willing, "in its discretion," to give him "temporary authority" to render the service required. Section 311(a) of the Interstate Commerce Act. This the Commission may do "without hearings or other proceedings." However,

> "Such temporary authority shall be valid for such time as the Commission shall specify but *not for more than an aggregate of one hundred and eighty days* * * *."
>
> Interstate Commerce Act, section 311(a), 49 U.S.C.A., sec. 911(a).

The Commission's grant of an intercoastal license to Pan-Atlantic on May 18, 1955, was such a "temporary authority" (R. 6, par. 8; R. 9-10, Exhibit 12).

When, therefore, the Commission extended this temporary license on October 28, 1955, beyond the 180 day limit, without holding a hearing, without providing an opportunity for

presentation by the parties of their case by oral evidence, without a report of its findings on that evidence, and without making the findings required by section 309(c) of the Interstate Commerce Act quoted above (R. 6; R. 14, Exhibit 17), the question arose, by what provision of law was such an extension exempted from the provisions of section 309 of the Interstate Commerce Act and from sections 5(a), 5(b), 7(c) and 8(b) of the Administrative Procedure Act? The appellees on October 13, 1955, advised the Commission of their view that there existed no warrant in law for such Commission action (R. 12, Exhibit 16), and exhausted their administrative remedy by petition filed on or about November 23, 1955 (R. 15, Exhibit 18) and denied by order dated January 9, 1956 (R. 18, Exhibit 19).

Explanation for the Commission's failure to comply with section 309(c) of the Interstate Commerce Act and with the Administrative Procedure Act as cited above begins with the fact that on May 5, 1955 Pan-Atlantic had filed with the Commission an application for intercoastal authority pursuant to the provisions of section 309 of the Interstate Commerce Act. (R. 4-5, pars. 6-7). The temporary intercoastal authority which the Commission granted Pan-Atlantic 13 days later on May 18, 1955 was appreciably more limited in scope—that is, it authorized service between fewer ports, than was applied for on the prior May 5th. (R. 6, par. 6; R. 3-4, par. 3; R. 4, par. 6). As indicated by Exhibit 12 (R. 9), that grant of temporary authority was not responsive to the May 5th application, but to another one "made * * * under the provisions of section 311(a) of the Interstate Commerce Act." The date on which the section 311(a) application was filed and the circumstances which gave rise to it are not of record. (Pan-Atlantic brief, p. 6) The May 5th application for permanent authority was still pending and undecided by the Commission on October 28, 1955 (R. 6, par. 12) when the Commission issued its

extensions of temporary authority here under adjudication, (R. 7, pars. 20 and 21) nor had it terminated when the complaint herein was filed on April 30, 1956 (R. 9). Until and if this Court receives a suggestion of mootness such as was the basis for dismissal of the appeal in *Interstate Commerce Commission* v. *Stone's Express*, 350 U.S. 906, 100 L. ed. 795 (1955), it may reliably be presumed that no final order has been entered by the Commission and has become effective responsive to the May 5th permanent authority application. The extension of the temporary authority beyond 180 days by the Commission's order of October 28, 1955, which the Court below ordered vacated, was limited to a duration "not beyond the time said application No. W-376 (Sub-No. 13) has been finally determined" (R. 14-15, Exhibit 17), in other words, was limited to the period of pendency of the permanent authority application of May 5, 1955.

The Commission viewed the permanent authority application as

> "a case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license."
>
> Administrative Procedure Act, section 9(b), 5 U.S. C.A., sec. 1008(b)

Therefore the Commission believed Pan-Atlantic's temporary authority granted May 18, 1955 to be, "a license with reference to * * * activity of a continuing nature" which section 9(b) prohibits from expiring until the "timely and sufficient application for a renewal or a new license" has "been finally determined by the agency."

C. Therefore temporary Interstate Commerce Commission licenses are of a "type" and "class" different from those of permanent licenses.

If this case were governed by the 1943 original Ohio legislation the May 5th application would have to be one of

"the same type or class * * * of (the) existing license," and the license preserved from expiration would have had to be held by Pan-Atlantic on May 5, 1955 when the permanent authority application was filed. Obviously the temporary authority was not thus held on May 5, 1955.

Does it differ in "type or class" from that sought by the May 5th application? Rather extensively, must be the answer:

Temporary authority granted May 18, 1955	Permanent authority applied for May 5, 1955
Duration of the subject license:	
Limited to a period of 180 days. (R. 9-10, Exhibit 12) 49 U.S.C.A., sec. 911(a).	Unlimited in duration. (R. 4-5) *United States* v. *Seatrain Lines*, 329 U.S. 424, 91 L. ed. 396 (1947)
Findings prerequisite to the grant:	
It will "enable the provision of service for which there is an immediate and urgent need to a point or points within a territory having no carrier service capable of meeting such need." 49 U.S.C.A., sec. 911(a)	(1) "Applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of (Part III of the Interstate Commerce Act) and the requirements, rules, and regulations of the (Interstate Commerce) Commission thereunder." (2) "(T)he proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." 49 U.S.C.A., sec. 909(c).

Limitations on the manner in which and sources from which the Commission may obtain information to warrant the prerequisite findings:

None. The Commission's decision is discretionary. 49 U.S.C.A., sec. 911(a)

Findings must be based on evidence of record obtained under procedural rules applicable fairly in all cases.

Competitors must be given an opportunity to present facts and argument at a hearing through oral and documentary evidence, and to cross examine applicant's witnesses. Administrative procedure Act, sections 5(b), 8(b), 7(c), 5U.S.C.A., sec. 1004 (b), 1007(b), 1006(c). *Pinkett* v. *United States*, 105 F.Supp. 67 (D., Md., 1952)

The scope of the licenses involved. (R. 3-6)

Service is not authorized to the ports cited opposite.

Service is authorized to and from the ports of Anacortes, Astoria, Bellingham, Bradwood, Bremerton, Empire, Everett, Grays Harbor, Kalama, Long Beach, Long View, Mare Island, Marshfield, North Bend, Olympia, Port Angeles, Port Townsend, Prescott, Ranier, Richmond, St. Helens, San Diego, Tacoma, Vancouver, Warrenton, Wauna, Westport, Willapa Harbor, Yaquina Bay, Albany, Bayonne, Bayway, Bridgeport, Brunswick, Camden, Chester, Georgetown, Irvington, Marcus Hook, New London, Newport News, Paulsboro, Port Everglades, Portland, Port Newark, Portsmouth, Poughkeepsie, Providence,

	Savannah, Wilmington, Delaware and Wilmington, N.C.
Service is authorized to and from Miami.	Service is not authorized to Miami.
Service from five Pacific coast ports is limited to only seven Atlantic coast destinations.	Service from the same five Pacific coast ports is authorized to thirty-two Atlantic coast destinations.
Service from two Pacific coast ports is limited to only five Atlantic coast destinations.	Service from the same two Pacific coast ports is authorized to thirty-two Atlantic coast destinations.
Service from four Atlantic coast ports is limited to six Pacific coast destinations.	Service from the same four Atlantic coast ports is authorized to twenty-five Pacific coast destinations.

D. Just as is true of the Ohio Administrative Procedure Act, the Federal Act limits postponement of agency license expirations to the pendency of applications for licenses only of the same type and class of the existing license to be preserved from expiration.

Even though the federal statute, *i.e.,* the third sentence of section 9(b), does not in so many words require that the license application the filing of which preserves another license from expiration be a license of "the same type or class" as the existing license (as does the 1943 Ohio statute), is there reason to believe that this requirement is implicit in,—indeed, is a basic assumption underlying the federal legislation? Perhaps a good way to search for an answer to the question is to explore the meaning with which the federal statute would be endowed by any other interpretation of it.

Assume a temporary license to carry between New York and Washington, and to serve all intermediate points. Is it

preserved from expiration by the licensee's application to carry between Boston and Miami? Perhaps a reasonable re[illegible] would be, yes, because even though the successor license applied for is broader in scope, exercise of the successor licensed privilege, once granted, will include operations which constitute an exercise of the existing licensed privilege. Perhaps the same answer could be given if the successor license were one to carry between Boston and Washington. Suppose, however, the successor license were one to carry between New York and Washington but to serve *no* intermediate points? or one between Boston and Philadelphia? or one between Philadelphia and Baltimore? In other words, suppose the successor application, regardless of how broad its scope, omitted coverage of a part of the operation being conducted under the existing license. Would section 9(b) preserve the existing license from expiration in part? This is actually the case here, where Pan-Atlantic's present license authorizes service at Miami and its permanent license, if granted as sought, will not.

Suppose the existing license between Boston and Washington were via U.S. Highway Number One, and the successor license application sought permission to use the Connecticut and New York parkways, and to use U.S. Highway 40 between Baltimore and Washington? Perhaps the answer might be that the discrepancy between the routes would render the successor activity different from that occurring under the existing license; hence the existing license is not preserved from expiration. However, suppose the route differences were very minor, for instance the substitution of one street for another by which to traverse a small town?

Assume a temporary license to carry "general commodities" between A and B, and an application for a successor license to carry only textiles; or assume the reverse? Assume a temporary license to carry automobiles in so-called drive-

away service, where the carrier employee moves the auto under its own power, and a successor license application to carry automobiles by the "truck-away" method aboard large, highway multiple automobile trailers?

Assume a temporary permit to carry as a common carrier succeeded by an application for a certificate authorizing contract carrier operations? (Compare sections 309 (a) and (f), 302 (d) and (e), 208 and 209, 203 (a) (14) and (15) of the Interstate Commerce Act, 49 U.S.C.A., secs. 909, 902, 308, 309, 303).

Perhaps appellants' reply to these problems is that they are not real, because they have never arisen in spite of the fact that the Commission has extended temporary licenses beyond 180 days for several years in reliance on section 9(b) of the Administrative Procedure Act. Such a reply would ignore the fact that the Commission has heretofore undertaken to exercise its discretion when extending temporary authorities and approvals beyond 180 days and by this measure of control has liminally discouraged attempts by applicants for licenses to extend their existing and temporary operations by filing successor licensing applications. So long as the Commission reserved discretion to refuse an extension beyond 180 days, it was futile to argue concerning whether a temporary authority vested the licensee with some sort of an indefeasible interest.

In the case at bar, however, Pan-Atlantic correctly advises the Court that if the Commission is to prevail, it is because section 9(b) *by operation of law* extends Pan-Atlantic's intercoastal license. The success of such a contention will present the Commission in the future with many problems it had no occasion to deal with in the past, and its solution of those problems can rather confidently be expected to require the testing of litigation and court review. There-

fore, regardless of how real such problems have been in the past, regardless of whether the Commission's regulatory experience indicates a need to resolve them, if the Commission prevails in this appeal those problems will be real in the future and it is very necessary to bear them in mind when exploring the consequence of a proposed interpretation of section 9(b).

The principle sought to be established by appellants will be equally applicable to "temporary approvals" issued under sections 311(b) and 210a(b) of the Interstate Commerce Act, 49 U.S.C.A., sec. 911(b) and 310a(b). *Stone's Express* v. *United States*, 122 F.Supp. 955 (D., Mass., 1954) There also the question of relationship between the existing license and that applied for is a complex one. For example suppose the temporary licensee operating a vendor's properties is only one of several applicants for approval of a purchase of the vendor's properties, or is only an affiliate or subsidiary of the applicants for the permanent permission to purchase?

The facts in the case at bar, of course, do not present these problems in any acute form for decision. However, the question of statutory construction posed by the case at bar must inevitably give rise to them in the future unless the judgment below is affirmed. This is true because the third sentence of section 9(b) is limited to

> "a case in which the licensee has * * * made * * * application for a renewal *or* a new license."

One is left with three choices in interpreting this language: (1) The "application" thus referred to must be for the same license presently held by applicant. (2) The authority sought need bear no relationship to that presently enjoyed by applicant. (3) The successor application must request authority *somewhat* like that presently enjoyed.

The second interpretation invites a chaotic situation which should not be created without the plainest indication of legislative intent requiring it. It is a construction quite at odds with the admonition of section ~~12 of~~ the Administrative Procedure Act, 5 U.S.C.A., 1011 that,

> "Nothing in this Act shall be held to * * * limit or repeal additional requirements imposed by statute or otherwise recognized by law. * * *",

and with the statement by the bill's manager, Senator McCarran, Chairman of the Senate Committee on the Judiciary, made on the Senate floor that,

> "We do not wish to disrupt or change anything that was statutory, and yet we wanted to establish something which would prescribe and define the avenue by which the individual citizen could gain access to a public agency which would touch his private life, and we wished to find for him a way through the procedure."
>
> " * * * (W)e do not interfere with the statute, anywhere in this bill."
>
> U.S. Government Printing Office, *Administrative Procedure Act*, Proceedings in the House of Representatives and in the Senate of the United States (1946), pp. 12, 14.

The third interpretation, of course, would be an extraordinary one—namely that the successor application must request authority somewhat like that presently enjoyed; extraordinary not because it isn't perfectly feasible for the administrative agency to set reasonable bounds to the word "somewhat," but because the statute's prohibition operates as a matter of law and leaves nothing to the agency's discretion. There is no occasion for an agency order empowering the continuance of the temporarily licensed activity beyond 180 days. Hence if we were to accept the "somewhat" con-

struction, it would be up to the individual licensee to decide whether his successor application was for a license sufficiently similar to his existing license to warrant the assumption that the existing license had not expired. The decision would have to be made at the risk of an agency enforcement action or of a criminal prosecution if the licensee decided wrongly. It cannot be suggested that any statutory guide exists concerning the degree or quality of likeness required. As thus construed the statute would be so vague as to distribute justice by, let alone the Commissioner's foot, the size of the applicant's foot.

If the lead to reasonable legislative purpose furnished by the parallel Ohio statutes is viewed as useful, however, it appears that the successor application which the Congress had in mind was an application for a license of "the same type or class * * * of (the) existing license," as noted above. The assumption that these qualifying words are implicit in section 9(b)'s description of the "case" in which an existing license shall not expire avoids the extremes deplored above and the statutory uncertainties which give rise to them. It is also true, however, that such an assumption forbids any conclusion that the Commission could extend Pan-Atlantic's temporary intercoastal license beyond the period provided for in the enabling statute, section 311(a) of the Interstate Commerce Act. Such a conclusion is precluded by the differences between the two certificates involved. They rely on different bases for their grant. One results from a scrutiny much more elaborate than the other. One issues without concern for its effect on the licensee's competitors; the other requires attention to the effect on competitors of a grant of the license sought. One is for a term, warranting no reliance by the licensee on a continuation of the licensed privilege; the other is the equivalent of in fee. And in point of fact one permits limited carriage between a handful of east and west coast ports and the other would authorize service at 57 ports in all. Concededly the

permanent intercoastal certificate which Pan-Atlantic seeks is "somewhat" like the temporary intercoastal permit which it presently has, but they are clearly licenses of different types and classes, and "somewhat like" cannot be compressed into meaning "the same as."

The Appellees suggest that the Court's review in 1940 of its past practice in interpreting statutes is a helpful guide in the case at bar:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results, but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." (citations omitted)
>
> *United States* v. *American Trucking Associations*, 310 U.S. 534, 543-4, 84 L. ed. 1345, 1351 (1940)

III. Agency interpretations of section 9(b) of the Administrative Procedure Act are not useful guides or precedents to the meaning of its third sentence.

A. The Interstate Commerce Commission's interpretation:

The appellants, however, and especially the Interstate Commerce Commission, suggest countervailing considera-

tions which merit some thought. The first is that the Interstate Commerce Commission for a prolonged period has interpreted section 9(b) of the Administrative Procedure Act as authorizing temporary license extensions beyond 180 days. Such an interpretation by an administrative agency deserves weight, say the appellants, and warrants public reliance which should not be disturbed at a late date in the course of court review.

1. The Commission's original interpretation of section 9(b)'s third sentence was admitted publicly to be a matter of expediency arrived at without assurance of legal accuracy.

This interpretation by the Commission was first made on September 16, 1947 and is a part of the Commission's notices and general orders reported in the Federal Carriers Reporter of Commerce Clearing House, Inc. It may be found in the Statutes and Regulations volume of that service at paragraph 23,040 on page 23,147. This advice to the public by the Commission reads:

TEMPORARY AUTHORITY—DURATION

Interstate Commerce Commission

Notice Issued September 16, 1947

During and immediately following the war, while the Second War Powers Act was in effect, the Commission issued a large number of temporary authorities authorizing motor carrier operations for which there was an immediate and urgent need. These temporary authorities continued until March 31, 1947, when the Second War Powers Act expired. In order to enable the continuance of needed services, temporary authorities expiring September 27, 1947, were issued to a large number of carriers. Many of the carriers to whom these authorities were issued filed applications for certificates of public convenience and necessity or permits to continue the operations performed under temporary au-

thority. Many of these applications for certificates and permits have been decided but all of the certificates and permits authorized have not been issued as the period within which protestants may file petitions for rehearing, reargument, or reconsideration has not expired. Owing to the large number of these applications, plus the applications filed as the result of the post-war changes in commerce and industry, the Commission could not determine all of them by September 27, 1947, the expiration date of the temporary authorities.

Consideration has been given by Division 5 of the Commission to the question whether the operations conducted under temporary authorities, issued for a period of 180 days, expiring September 27, 1947, may be continued after September 27, 1947, where timely filed applications for certificates or permits covering generally the same operations have been filed, but have not been finally determined. There is a divergence of legal opinion on the question. Some of the Commission's lawyers are of the opinion that an extension is authorized by Section 210a(a) of the Interstate Commerce Act; others are of the opinion that continuances of such operations are authorized by Section 9(b) of the Administrative Procedure Act; while others doubt that either Section 9(b) of the Administrative Procedure Act or Section 210a(a) of the Interstate Commerce Act or any other provision, either extends or authorizes the Commission to extend, these temporary authorities where they have been in effect for 180 days subsequent to March 31, 1947.

Under the circumstances, and because it appears that the public interest would suffer from a termination of the motor carrier services being conducted under the temporary authorities, Division 5 of the Commission has concluded to authorize the carriers to continue the services authorized by temporary authorities until further order of the Commission, but not beyond the time the corresponding certificate or permit applications have been finally determined either by a denial of an application or by the issuance of a certificate or permit.

The Commission's annual reports to the Congress evidence a continued concern whether the Commission's interpretation of section 9(b) above described was correct. This concern was warranted because, as the Commission noted at page 122 of its Sixtieth Annual Report for 1946, with the expiration of the Second War Powers Act it would lose its emergency powers to license motor and water carriers on a temporary basis. It desired to obtain such powers on the same basis which empowered it to regulate car service among railroads. A review of the Commission's car service powers, section 1 (10)-(17) of the Interstate Commerce Act, 49 U.S.C.A., sec. 1 (10)-(17), reveals that they are in no way limited to periods of 180 days or of any other fixed length in their exercise.

> "11. We recommend that this Commission be given permanent emergency powers with respect to service by motor carriers and water carriers such as it now has with respect to car service by rail carriers. We now have such power temporarily over motor carriers under the Second War Powers Act, which will expire March 31, 1947, or earlier."
>
> *Sixtieth Annual Report of the I.C.C.*, p. 122 (United States Government Printing Office, 1946)

2. The Commission has requested Congress to enact amendments to the Interstate Commerce Act which would be unnecessary if section 9(b) of the Administrative Procedure Act meant what the Commission says it does.

The Administrative Procedure Act [including section 9(b)] became law by the act of June 11, 1946, c. 324, 60 Stat. 237. In spite of that fact, and in spite of the Commission's interpretation of that act published September 16, 1947 and quoted above, the Commission's 61st Annual Report dated November 1, 1947 made the request,

> "10. That this Commission be given emergency powers with respect to service by motor carriers and water carriers such as it now has with respect to car service by rail carriers."

In spite of these requests the amendment of section 1501 of the Second War Powers Act on June 29, 1946, c. 526, sec. 1, 60 Stat. 345 restored to sections 210a and 311 of the Interstate Commerce Act the provisos which limited the Commission's emergency powers to 180 days.

The Commission remained disturbed about the matter and in 1955, p. 132 of its Sixty-Ninth Annual Report advised:

> "20. We recommend that section 210a(a) and (b) be amended so as to authorize the Commission to grant temporary authorities and temporary approvals beyond a period of 180 days."

This request undoubtedly was occasioned by the decision in *Stone's Express* v. *United States*, 122 F.Supp. 955 (D., Mass.) which was published May 25, 1954. However, whatever may have been the Commission's concern to preserve its power to extend temporary motor carrier licenses under Part II of the Interstate Commerce Act, 49 U.S.C.A., 301, *et seq.*, the Commission's regulatory problems did not require a like request with respect to water carriers until 1956 when it stated at p. 166 of its Seventieth Annual Report.

> "12. We recommend that section 210a(a) and (b) and section 311(a) and (b) be amended so as to authorize the Commission to grant temporary authorities and temporary approvals beyond a period of 180 days."

This is quite at variance with *United States* v. *American Trucking Associations*, 310 U.S. 534, 549, 84 L. ed. 1345, 1354 (1940) cited in the Commission's brief, p. 30 and Pan-Atlantic's at p. 38, where the Court said,

"Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provision's enactment to Congress."

3. The Commission's rules, based on its interpretation of section 9(b) reserve, to the Commission a discretion to cancel temporary licenses which is inconsistent with the only meaning section 9(b) can have if it is applicable to temporary licenses.

Is it reasonable to give weight to the Commission's construction of section 9(b) when that construction has resulted in the publication of the rules set forth in Appendix D of Pan-Atlantic's brief, p. 13a, and when section 2.4 of those rules attempts to reserve discretion to the Commission quite beyond any enabling effect of section 9(b)'s third sentence? Compare

"Nothing in these rules shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under Section 9(b) of the Administrative Procedure Act (5 U.S.C. 1008(b))."

with

"In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, *no license* with reference to any activity of a continuing nature *shall expire* until such application shall have been finally determined by the agency."

Administrative Procedure Act, section 9(b), 5 U.S.C.A. 1008(b).

Therefore, the Commission's interpretation of the statute is not entitled to weight because: (1) The Commission's

notification to the public of that interpretation indicated it was arrived at as a matter of expediency and in the face of staff dissent so serious and so well-reasoned as to require inclusion of that dissent in the public notice. (2) The Commission's requests to Congress for further legislation indicate no confidence in its own interpretation of the statute and those requests have met with no response. (3) The Commission's interpretation as set forth in its rules quoted above is at variance with the meaning of the statute, and there is indication that the Commission would deplore any result which would deprive it of the power of terminating temporary licenses "at any time, in accordance with law"; yet such must be the result if the Commission were to succeed as appellant here.

It might be suggested that, the third sentence of section 9(b) to the contrary not-with-standing, the second sentence of that section preserves to the Commission the power to cancel temporary licenses, hence the freedom to refrain from extending them beyond 180 days. In this regard it is troublesome that, as the Commission stated in its brief to the trial court below (p. 14),

> "Both the Senate and the House Judiciary Committees in their reports on the bill which became the Administrative Procedure Act, in commenting on section 9(b) expressed the view that the *second* sentence of that subsection would not apply to temporary authorities. (Legis. His. A.P.A. p. 212 and 275). The Attorney General, in his letter of October 19, 1945, to the Chairman of the Senate Judiciary Committee stated, "The second sentence of subsection (b) is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses."

Recalling the review of section 9(b) set forth at the beginning of this brief, it would be understandable had the Congressional committees and the Attorney General assumed

that *a fortiori* the *third* sentence of section 9(b) would be read as inapplicable to temporary licenses. However, the Commission's contention below was that the mandatory nature of section 9(b)'s third sentence was not at variance with Rule 2.4 of the Commission's rules quoted above, because, "The language 'shall not expire' merely inhibits the expiration, not the enforcement of regulatory requirements."

This conclusion that what is granted by section 9(b)'s third sentence is withdrawn by the section's second sentence (or other statutory cancellation powers) certainly offers poor protection to the "individual citizen" for which the Congress "wanted to establish something which would prescribe and define, the avenue by which (he) could gain access to a public agency which would touch his private life, and we wished to find for him a way through the procedure." (U.S. Government Printing Office, *Administrative Procedure Act*, *op. cit.*, p. 12) It seems to us inescapably plain that the purpose underlying section 9(b)'s third sentence was to guard the citizen against agency dalliance and against an arbitrary withholding of agency action which could cause a term license to expire solely because of agency failure to put in process the normal procedures for its renewal. The Commission's suggestion that, nonetheless, such a license may be cancelled at will, at least so long as it is a temporary one, withdraws from at the same time it extends to temporary licensees the only protection which gives the statute *raison d'etre*.

The appellees have therefore concluded and now urge that the Commission's interpretation of the statute has been so tentative and gives birth to such conflicts that, whatever else may be said for, against or about it, it is not entitled to weight in the course of this Court's deliberations.

B. The Civil Aeronautics Board has not interpreted section 9(b) of the Administrative Procedure Act as

postponing expiration of discretionary exemptions under section 416(b) of the Civil Aeronautics Act pending determination of CAB certification applications.

The Commission cites not only its own interpretation of section 9(b) of the Administrative Procedure Act as reason for reversing the judgment below, but also that of the Civil Aeronautics Board under section 416(b) of the Civil Aeronautics Act, 49 U.S.C.A., sec. 496(b). The C.A.B.'s interpretation is said to be indicated by Part 290, Title 14 of the Code of Federal Regulations.

We concede that Part 290 of 14 C.F.R. agrees with the meaning which the Interstate Commerce Commission assigns to the words "of a continuing nature" in section 9(b) of the Administrative Procedure Act, 5 U.S.C.A., sec. 1008(b). Both agencies evidently deny that activity of a continuing nature is merely a more general statement of the activity described in the Ohio legislation as "engaging in a business or profession." The appellees disagree for the reasons abovestated, but regardless of that contention, we do not understand the Civil Aeronautics Board to believe itself endowed with the power to extend temporary licenses the duration of which is limited by law, during the pendency of a permanent certification proceeding. In point of fact, section 416(b) of the Civil Aeronautics Act, 49 U.S.C.A., sec. 496(b), which provides for exemption of carriers from the certification provisions of the act, places no limitation whatsoever on what may be the maximum term of such an exemption.

Moreover in *Eastern Airlines* v. *Civil Aeronautics Board*, 185 F. 2d 426 (App., D. C., 1950) the Court of Appeals was asked to vacate a CAB order exempting Capital Airlines, Inc. under section 416(b) of the Civil Aeronautics Act, and thus licensing it through a "letter of registration" to conduct air carrier operations as a non-certificated carrier. The original

such exemption order was entered by the Board on September 27, 1948 and was limited to a term of one year. On October 24, 1949 the temporary license was extended for six months. Prior to the expiration of that six months, on November 23, 1949 the licensee applied for a certificate of public convenience and necessity authorizing the operations then being conducted under the temporary license. The Court's decision concerning vacation of the CAB's temporary licensing order of October 24, 1949 was made on October 23, 1950. It does not indicate whether Capital's application for a certificate was still pending at the time of the decision or even on April 24, 1950 when the term of the second temporary license expired. The Court's decision was to affirm the CAB's order, but it included the following observation:

> "Since *the exemption order, and its successor, have expired by their own terms,* we might dismiss the petition for review as moot. But judicial decision of important questions that are likely to recur should not be 'defeated, by short-terms orders, (sic), capable of repetition, yet evading review'." (185 F. 2d at 427, emphasis supplied.)

In 1951 this Court vacated the judgment below and remanded the case to the Court of Appeals with directions to dismiss the suit as moot. *Eastern Airlines* v. *Civil Aeronautics Board,* 341 U.S. 901, 95 L. ed. 1341 (1951)

It is true that no suggestion appears to have been made either to the Court of Appeals or to this Court that by virtue of the third sentence of section 9(b) of the Administrative Procedure Act the temporary license in question was preserved from expiration during the pendency of Capital's certification application. We do not contend therefore that either *Eastern Airlines* v. *Civil Aeronautics Board,* 185 F. 2d 426 or *Civil Aeronautics Board* v. *American Air Transport,* 201 F. 2d 189 (App., D. C., 1952), a case with somewhat

similar implications, constitute precedentially useful decisions concerning the meaning of section 9(b)'s third sentence, but the position taken by the Civil Aeronautics Board in each certainly seems inconsistent with the views imputed to the Board by the Interstate Commerce Commission herein.

IV. The contention that the agency has administrative need for the power to extend temporary licenses during the pendency of permanent certification proceedings:

A. Interstate Commerce Commission temporary operating authorities are not issued on the basis of *evidence* of an urgent and immediate need, and there is no evidence of such a need in the record herein.

Next the Commission invites the Court's attention to the urgency of the need for the type of regulatory power which has been assumed under the aegis of section 9(b), and to the frequency with which it has been exercised in the past. The Commission points out that,

> "Where the *evidence* indicates an immediate and urgent need for a definite period which is less than 180 days, the Commission grants temporary authority for the period of the need and the operation is not regarded as of a continuing nature beyond that period, within the meaning of section 9(b). Where it appears that the need will continue for an indefinite time, at least beyond 180 days, temporary authority is granted for the maximum period of 180 days."
>
> (I.C.C. brief, p. 11)

Pan-Atlantic supplements this by advising the Court in its brief, pp. 6-7, that Pan-Atlantic's application for the temporary license which it now has (hence, presumably the Commission order granting that license) was "in response

to an urgent and immediate public need" for such water carrier transportation. Then Pan-Atlantic remarks that the Commission's findings in support of the grant of temporary authority included one that the service thus authorized "was contained within the scope of the application of Pan-Atlantic for a permanent certificate."

The sort of error which can creep into deliberations concerning this matter is illustrated by the foregoing statements by the appellants—statements undoubtedly made in good conscience which, none-the-less, misrepresent important aspects of section 311(a) of the Interstate Commerce Act enabling issuance of temporary authorities. We disagree with the Commission that temporary licenses are issued on the basis of what "evidence" may "indicate" to be true. As pointed out above, they are issued according to the agency's discretion, without hearing, without the testing of cross-examination, without opportunity to competitors, much less to introduce evidence in opposition, even to marshal the facts in opposition and adequately to prepare a statement concerning them because action on temporary licensing applications necessarily must be taken rapidly and entirely at the agency's discretion. *Kansas City & Leavenworth Transp. Co.* v. *United States,* 51 F.Supp. 916 (D., Del., 1943)*; *Schenley Distillers Corporation* v. *United States,* 50 F.Supp. 491 (D., Del., 1943); *Hudson River Day Line* v. *United States,* 85 F. Supp. 225 (S. D., N. Y., 1949); *Baltimore Transfer Co.* v.

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* This case, cited by both appellants for the proposition that the Commission's temporary licensing powers were enacted to hold the line, as it were, pending the outcome of permanent license proceedings, (Pan-Atlantic brief, p. 23, I.C.C. brief, p. 12) has nothing to do with that question in any contemporary context, because it concerned a temporary license issued and then outstanding while the 180 day limitation had been suspended from operation by wartime legislation. Consequently the court was at liberty to view sections 210a (a) and 311 (a) of the Interstate Commerce Act in a broader policy context and certainly without any reference to section 9(b) of the Administrative Procedure Act, which latter is the only statute a question concerning the construction of which is presented by the case at bar.

Interstate Commerce Commission, 114 F.Supp. 558 (D., Md., 1953), aff'd. 346 U.S. 890, 98 L. ed. 394 (1953); and *Bowen Transports* v. *United States,* 116 F.Supp. 115, 118, note 2 (E. D., Ill., 1953). Temporary licenses, at least by the Interstate Commerce Commission, may not fairly be said to issue "where *evidence* indicates an immediate and urgent need" (although of course the agency undoubtedly is satisfied from the limited information at its disposal that such a need exists). Likewise we disagree with Pan-Atlantic that its temporary authority application was filed in response to an urgent and immediate need. Inasmuch as the record is silent entirely on the matter we are not at liberty to state the reasons for our disagreement, but certainly such an assertion cannot be allowed to pass without protest. And in the course of discussing what is and what is not "evidence" in the case at bar, it should be noted that the Commission did not find that Pan-Atlantic's service under the temporary license "was contained within the scope" of its pending application for permanent authority, at the time the Commission extended the temporary certificate. The Commission's finding concerning the temporary service was:

> "That this service *corresponds in part* with that which the carrier by application No. W-376 (Sub-No. 13) seeks a certificate of public convenience and necessity; (sic)" R. 14, Exhibit 17)

B. More than half of the temporary licenses issued by the Commission under section 210a (b) of the Interstate Commerce Act which have been extended beyond 180 days have remained outstanding for periods exceeding three times the statutory period.

The Commission's brief, p. 29, cites a total of 10,776 temporary licenses to carry which have been issued during the five years ending January 1, 1957, and a total of 2,052 such licenses which have been extended beyond 180 days during

that period. We have no way of checking the accuracy of these statements because this information is not of record, but there is every reason to believe the information is correct because it is evidently based on the Commission's annual reports to Congress, and these in turn contain tabulations of Commission regulatory activity which may be presumed to be accurate. These figures, however, omit a detail which is very important in determining the economic and regulatory significance of the Commission's assumption of power to extend regulatory licenses beyond 180 days, namely, the duration of such extensions. If the average such duration is only a month beyond 180 days, or even if it is only twice the 180 day period it might be possible to urge that the policy of the Congress underlying the temporary licensing enabling provisions in the Interstate Commerce Act is not being frustrated.

It will be recalled that the Congress established a clearly and unambiguously stated limit of six months (180 days) on all Part II and Part III temporary licenses which issue without reception of evidence, without hearings, without reports on the Commission decisions involved, and without adequate opportunity to competitors to make their objections known. See sections 210a (a) and (b) and 311 (a) and (b) of the act, 49 U.S.C.A., 310a (a) and (b) and 911 (a) and (b). This limitation is so unquestioned and unquestionable that there is no suggestion in this case of a Commission power to issue a "renewal" 180 day license, or that Pan-Atlantic's request for extension of its temporary intercoastal authority constituted an "application" during the pendency of which its original 180 day license was preserved from expiration by section 9(b) of the Administrative Procedure Act. Very likely the provisions of section 9(b) do preserve a 180 day license from expiration under the Interstate Commerce Act pending the outcome of an application for its renewal. This proposition, however, is

relatively functionless, because it is quite clear that by the terms of the Interstate Commerce Act, unaided by other legislation, the Commission lacks the power to renew a 180 day license, at least so long as it relies for its basis on the same "need" which gave rise to its issuance in the first instance. Thus no such renewal application could reasonably be expected to remain pending for any considerable length of time because the Commission would deny it out of hand as being clearly beyond the Commission's power to entertain. In any event, the pendency of such a renewal of a 180 day license is not being urged as a basis for decision in the case at bar because in point of fact no such application was filed. (R. 6, par. 9; R. 11, Exhibit 15) The only application, in the "case" of the filing of which it is practical to urge the continuation of a temporary license is an application to make permanent the operation which has theretofore been conducted on a temporary basis.

Why did the Congress establish a limit of 180 days for the duration of temporary licenses under the Interstate Commerce Act? The foregoing explanation of sections 309 and 311 of the Interstate Commerce Act, 49 U.S.C.A., secs. 909 and 911, and of the provisions of the Administrative Procedure Act which are applicable according to *Pinkett* v. *United States,* 105 F.Supp. 67 (D., Md., 1952) accounts for the matter. Section 309 licenses (and section 5 licenses, 49 U.S.C.A., sec. 5) issue only after opportunity for careful scrutiny by the Commission into the economic need for and effect of the authorization sought by the applicant, an opportunity which is not afforded by procedures under sections 311 and 210a, 49 U.S.C.A., secs. 911 and 310a.

Further explanation of the Congressional policy involved is supplied by objections voiced by motor carrier interests when section 210a of the Interstate Commerce Act was proposed by H.R. 9737 and S. 3606, 75th Congress, 3rd Session, on the ground that a grant of temporary authority could be

used by an applicant for permanent authority to circumvent the traditional burden of proof required to be borne by such an applicant. To allay these fears, Commissioner Eastman, the Commission's spokesman before the Congress at that time, wrote the Subcommittee of the House Committee on Interstate and Foreign Commerce,

> " * * * (A)nd in any event the authority granted would be strictly limited in time by the proposed amendment."
>
> (Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 9737, 75th Cong., 3rd Sess., pp. 11-12).

In Document No. 154 appended to the record of these hearings Commissioner Eastman expanded on these views:

> "The act now contains no provision enabling us speedily to grant temporary operating authority to meet an emergency, pending such formal determination of the matter. We believe that we should have power to make such temporary grants. * * * However, the Commission should be capable of using the power with proper discretion *and in any event the authority granted would be strictly limited in time by the terms* of the proposed amendment." (emphasis supplied)

In his testimony before the Senate Subcommittee on Interstate Commerce, Commissioner Eastman said,

> " * * * (A)nd furthermore the temporary authority can be granted only for a period of not more than 180 days."
>
> (Hearings before Senate Subcommittee on Interstate Commerce on S. 3606, 75th Cong., 3rd Sess., p. 20)

As stated above, the statistical review presented in the Commission's brief, while it indicates that the Commission has had significant resort to its alleged power under section 9(b) of the Administrative Procedure Act to extend Inter-

state Commerce Act temporary licenses, does not indicate the extent to which such resort has caused these licenses significantly to exceed the statutory limitation urged by Commissioner Eastman as the safeguard which warranted enactment of the language in question.

Transportation Research, Inc. of Washington, D. C. (more familiarly known in the trade as "TRINC") publishes quarterly and annual reviews of all Class I motor carrier financial reports filed with the Interstate Commerce Commission. Until the third supplement for the years 1954-1953 this publication was entitled "Manual of Highway Carriers—Class I Freight." Since then it has been entitled "Comparative Financial and Operating Record, Class I Motor Freight Carriers." These publications in each issue have included the I.C.C. docket numbers of all unification of control applications filed with the Commission under section 5 of the Interstate Commerce Act, 49 U.S.C.A., sec. 5, in the course of which the Commission has issued a temporary license authorizing an applicant to control another carrier under section 210a (b) of the act, 49 U.S.C.A., sec. 310a (b), and then extended that license beyond a period of 180 days for the pendency of the permanent control application which gave rise to the temporary license. Information on such temporary license extensions as published by TRINC is limited to licenses issued to licensees who are Class I motor carriers, and is also limited because there are four sections of the Interstate Commerce Act enabling the issuance of temporary licenses, namely sections 210a (a) and (b) and 311 (a) and (b), 49 U.S.C.A., sec. 310a (a) and (b), and 911 (a) and (b), whereas the TRINC information is confined to extension of section 210a (b) licenses only. Furthermore, the railroad appellees have no way of knowing how exhaustive and accurate TRINC's review is even of the limited area of I.C.C. regulatory activity which it purports to report.

Because, however, the opinion below (R. 31 and 144 F.Supp. 53) indicates that, if section 9(b) of the Administrative Procedure Act authorizes temporary license extensions, it does so with respect to the other three enabling sections of the Interstate Commerce Act as well as for section 210a (a), and because the information tendered in appellants' briefs provides no basis on which to estimate the economic significance of such license extensions in terms of their duration, we have abstracted all the relevant I.C.C. docket numbers from TRINC's publications covering the period between January 1, 1952 and September 30, 1956 and have physically reviewed the records of those proceedings in the Commission's public docket room in Washington to determine for each the date of the order granting the temporary control license in the docket, the fact of that license's extension beyond 180 days, and the date of final order in the permanent control proceeding under section 5 of the Interstate Commerce Act, 49 U.S.C.A., sec. 5, which, by the terms of the temporary license extension, brought the temporary license to an end.

From January 1, 1952 until September 30, 1956 TRINC reported 1,409 Commission orders in so-called finance dockets, i.e., proceedings under section 5 of the Interstate Commerce Act. Of these 84 recited that the only circumstance giving rise to them was a desire by the applicant corporation to change its name. Thus there was left a net total of 1,325 functional orders for this period. Of these:

1,030)		(Permanent orders.
194)	were	(180 day licensing orders.
101)		(Orders extending 180 day licenses.

Of the 101 extensions reported by TRINC, our review of the dockets revealed two to be erroneous reports (dockets MC F 5565 and MC F 5527). At the time we made our re-

view 7 dockets were unavailable for inspection in the Commission's public reference room (March 12, 1957). The remaining 92 dockets (of the 101 containing orders extending 180 day licenses) are tabulated in appendix A to this brief. Those marked with an asterisk were dockets wherein the permanent authority application remained undecided on March 12, 1957, hence where the extended temporary license was still effective. The elapsed time figures set forth in the appendix were computed from the effective date of the original order granting a 180 day license until the effective date of a final order granting or denying the connected permanent authority proceeding, or, where no such final order had been entered, until March 12, 1957.

It will be noted that only 12 temporary licenses in the appendix expired in less than one year, i.e., after they had been extended beyond the statutory period only 12 of the 92 failed to extend more than twice as long as the statutory period. Two of them, dockets MC F 5407 and MC F 4819, have been outstanding for four years and no final order in MC F 5407 had been entered March 12, 1957. Six licenses are three years or more old, or more than six times the statutory period. Twenty-eight are two or more years old, or more than four times the statutory period. Fifty licenses extended beyond 180 days have been operative for periods in excess of eighteen months, or three times the statutory period. The portion of temporary licenses thus exceeding three times the statutory period constitutes 54% of the 92 licenses reviewed.

C. Temporary licenses outstanding for prolonged periods of time produce competitive changes as profound as permanent licenses; yet they are issuable *ex parte* and without any regard to their competitive effects.

In evaluating this information the mechanics of I.C.C. licensing proceedings should be borne in mind. Because of

its budgetary limitations the Commission is required extensively to rely on adversary proceedings to uncover information as to whether an applicant for a license meets the Commission's standards of fitness, and to determine whether the area of service involved is already so saturated with outstanding licenses and competing operations that the authorization of a new one will serve merely to fragment the available traffic further and weaken the individual elements of the carrier industry which are at the present providing service. Carrier operations, and especially rail and water carrier operations, require extensive capital investment, and a loss of traffic to a newly licensed competitor cannot often be compensated for by a proportionate reduction in carrier costs for the enterprise from which the traffic is diverted, because of the high ratio of fixed to variable costs in the business. The inevitable result is either a serious reduction in service or increased charges assessed against the remaining traffic; more frequently both results ensue. This in turn and for a time accelerates traffic diversion to the new carrier until a new balance is reached dictated by the limits of the new carrier's available investment and its service area. The Commission must bear such possibilities in mind when deciding upon license applications, and it often gives them exhaustive consideration. A classic case in which it has done so is *Pacific Inter-Mountain Express Co.—Control and Purchase—Keeshin*, 57 M.C.C. 341, 380 (1952). See also:

Von Der Ahe Van Lines, Inc.—Purchase—Swormstedt Storage, 60 M.C.C. 609, 610 (Div. 4, 1954)

Rudolph Motor Service, Inc.—Purchase—Dorre Truck. Corp., 60 M.C.C. 71, 84 (Div. 4, 1954)

Bowman—Purchase—Brown, 38 M.C.C. 783 (Div. 4, 1943)

Shein's Express—Purchase—Central Jersey Motor Lines, Inc., 59 M.C.C. 534, 548 (1953)

Liberty Motor Freight Lines, Inc.—Purchase—William Guy Tumbleson, 59 M.C.C. 581 (Div. 4, 1953)

Chippewa Motor Freight, Inc.—Purchase—Ernest Robert Koepp, 60 M.C.C. 44 (Div. 4, 1954)

L. Nelson & Sons Transp. Co.—Purchase—White's Exp:, 59 M.C.C. 675, 680 (Div. 4, 1953)

Robert E. Paup Common Carrier Application, 63 M.C.C. 139, 142 (1954)

Hancock Trucking, Inc., Extension, 62 M.C.C. 513 (1954)

West Bros., Extension—Pensacola, 68 M.C.C. 95, 103 (Div. 1, 1956)

Halls Motor Transit Co., Extension—Curtiss, 68 M.C.C. 231, 236 (Div. 1, 1956)

In making determinations such as these it is easy to understand not only that these applications attracted the adverse attention of applicant's competitors, but also that the Commission was materially assisted in reaching its decision by the facts brought to light through the conflict of adversary interests in the hearing room and on brief. However, no such disclosure through adversary proceedings is possible in the course of temporary licensing. On the other hand, the exercise of even temporary privileges to compete in a given area for a period in excess of 18 months can gel the competitive situation and can also do almost the same damage that would have been done by improvident issuance of a permanent license.

A temporary license exercised over a prolonged period of time also can have its effect on the way a permanent license application will look to the Commission when it reaches the point of ultimate decision on the matter. This is plain from *Watson Bros. Transportation Co., Inc., Extension—Dangerous Explosives*, 53 M.C.C. 1, 3 (Div. 5, 1951) where the Division, in granting the license, said,

"Applicant has been performing the proposed operations under temporary authority since 1949, and while

past operations under temporary authority are not conclusive of a public need for the proposed service they are entitled to some weight. It is true that no shippers or public witnesses appeared in support of the application. Instead applicant relies upon the contribution to public safety which would result from the proposed operations as a basis for the granting of the authority requested.

"In the circumstances, we think a finding that public convenience and necessity require the proposed operations has been justified. * * *"

However, the dissent of Commissioner Lee in that case indicates the possibility that the temporary operations were of determinative influence on the decision:

"The record contains no evidence of need for the service here proposed by applicant. Section 210a(a) of the Act expressly provides that the granting of the temporary authority shall create no presumption that corresponding permanent authority will be granted thereafter. In my opinion, the evidence does not support the finding that public convenience and necessity require the operation by applicant for which authority is here granted." 53 M.C.C. at 4

D. When empowering the Commission to issue temporary licenses Congress acted on the assurance that they must terminate within six months; if Congress had thought the Commission needed more than six months to process permanent certification applications, additional limitations would have been imposed on the Commission's temporary licensing powers before enlarging them to include licenses good for more than six months.

A question posed by the case at bar is whether when enacting the Administrative Procedure Act and subsequently reimposing the 180-day limitation on I.C.C. temporary licens-

ing power through amendment of the Second War Powers Act the Congress intended to create a new method by which carrier licenses would come into being in such a manner as to alter the competitive situation before the Commission ever had an opportunity to look into the matter through its formal procedures. The facts set forth in Appendix A indicate that this is what is happening today. We believe it is most unlikely that the Congress had any such situation in contemplation when enacting the legislation in question, and to the contrary the legislative history both of the Administrative Procedure Act and of the Interstate Commerce Act reviewed above points in quite another direction. So far as the Administrative Procedure Act is concerned, in enacting the third sentence of section 9(b) the Congress desired to preserve licenses in effect during the process of their *renewal*, and in circumstances when their periodic renewal is a statutory necessity (and *a fortiori* is a statutory possibility). And when endowing the Commission with temporary licensing powers under section 210a and 311 of the Interstate Commerce Act, 49 U.S.C.A., sec. 310a and 911, the Congress acted on the explicit assurance that such powers would not result in a change in the competitive picture unheralded by formal Commission investigation for a period longer than six months. Very likely the Congress hoped and expected that the *average* such period would be a good deal less than six months.

It is, of course, possible for the Congress to provide for a longer period. It would also seem appropriate to provide as well for a preferred position on the Commission's dockets of situations thus marked by temporary licensing. Perhaps as well the Congress might consider the establishment of an emergency investigation procedure which should precede temporary licensing for periods of more than six months. It is ill advised, however, to ask this Court to endow the Commission with temporary licensing power in excess of

six months in the absence of such safeguards, and this is what appellants seek in the case at bar.

The Commission's brief at p. 13, evidently as a basis for supporting the Commission's position concerning the meaning of section 9(b) of the Administrative Procedure Act, tenders the observation,

> "At the time section 210a was enacted, it was thought that a period of 180 days would be sufficient time within which to determine applications for certificates and permits. The same thought was followed when section 311 was enacted. It developed, however, that some proceedings could not be determined within that time, particularly contested applications involving extensive operations, of which the present application of Pan-Atlantic may be cited as an example."

The implication is that the Congress when enacting sections 210a and 311 desired to give the Commission whatever time it needed to get permanent applications out of the way; therefore this Court should implement that legislative policy by interpreting the Administrative Procedure Act in such a way as to preserve to the Commission whatever room it needs for maneuver. This desire by the agency involved is understandable, perhaps even praiseworthy. The factual premise from which the argument proceeds, namely what Congress desired, is debatable, however. As noted above, operations under the aegis of temporary license are quite different things from operations authorized after formal Commission review. Commissioner Eastman was able to obtain Congressional authority for the Commission to license temporary operations in a summary and *ex parte* proceeding only on the basis of the frequently reiterated assurance that they would persist for no more than six months. Not only is there no evidence in the legislative history warranting the conclusion that the Congress desired to enable temporary licensing during the pendency the permanent license appli-

cation proceedings *regardless of the duration of the latter*, but also that history does contain assurances that, without regard to the duration of the permanent authority proceeding, the temporary licensing power would not extend beyond six months per license. It is not unreasonable to suspect, at least, that the Congress relied on these assurances in enacting the enabling legislation. It is the contention of appellants that the question whether such licensing power is to be enlarged is not a matter of detail or of mechanics, that it includes within it serious questions of policy-making, that it was never decided in 1946 when the Administrative Procedure Act became law, and that the place for its decision is the Congress and not this Court. If it be true (and it is by no means clear that preferential docketing could not speed up licensing applications connected with temporarily licensed activity) that six months is too short a time within which to attempt to handle licensing applications under the Interstate Commerce Act, one is reminded of Judge Learned Hand's observations concerning the analogous situation arising in *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 154 F. 2d 785, 788-9 (2 Cir., 1946), aff'd. 328 U.S. 275, 90 L. ed. 1230, 167 A.L.R. 110 (1946):

> "When we consider the situation at the time that the Act was passed—September, 1940—it is extremely improbable that Congress should have meant to grant any broader privilege than as we are measuring it. It is true that the nation had become deeply disturbed at its defenseless position, and had begun to make ready; but it was not at war, and the issue still hung in the balance whether it ever would be at war. If we carry ourselves back to that summer and autumn, we shall recall that the presidential campaigns of both parties avoided commitment upon that question, and that each candidate particularly insisted that no troops should be sent overseas. The original act limited service to one year, and it was most improbable that within that time we should be called upon to fight upon our own soil; as indeed the event proved, for we were still at peace in September,

> 1941. Congress was calling young men to the colors to give them an adequate preparation for our defense, but with no forecast of the appalling experiences which they were later to undergo. Against that background it is not likely that a proposal would then have been accepted which gave industrial priority, regardless of their length of employment, to unmarried men—for the most part under thirty—over men in the thirties, forties, or fifties, who had wives and children dependent upon them. Today, in the light of what has happened, the privilege then granted may appear an altogether inadequate equivalent for their services; *but we have not to decide what is now proper;* we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which sec. 8(b) and sec. 8(c) were cast." (emphasis supplied)

It is the appellees' suggestion that what the Court has to decide is not what sort of temporary licensing powers would be appropriate to the Commission's needs, but what powers the Congress deemed to be appropriate to those needs in 1938 when section 210a of the Interstate Commerce Act was enacted, and in 1940 when section 311 became law, 49 U.S.C.A., sec. 310a and 911; what powers the Congress thought appropriate when by amending the Second War Powers Act on June 29, 1946, c. 526, sec. 1, 60 Stat. 345 it reimposed the 180 day limitation on the Commission; what powers the Congress thought it was creating on June 11, 1946 when it enacted the Administrative Procedure Act, c. 324, 60 Stat. 237, 5 U.S.C.A., sec. 1001 *et seq.* and included in it the words:

> "Nothing in this Act shall be held to * * * limit or repeal additional requirements imposed by statute or otherwise recognized by law. * * *"
>
> Section 12, Construction and Effect., Admin. Procedure Act. 5 U.S.C.A., sec. 1011
>
> and
>
> "(a) In General.—No sanction shall be imposed or substantive rule *or order* issued except within jurisdiction delegated to the agency and as authorized by law."

Section 9. Administrative Procedure Act, 5 U.S.C.A., sec. 1008.

V. The court below did not err in relying solely on *stare decisis* as a basis for decision. *Radovich* v. *National Football League* U.S. , 25 Law Week 4152 (1957); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953)

In addition to arguments of appellants discussed above, the appellant Pan-Atlantic makes two further contentions which require mention. The first is that the court below erred because two of its three members indicated that, were the case *res integra*, they would have dismissed the complaint. It should be noted that Circuit Judge Magruder gave no indication that such was his view of the matter. However, this contention by Pan-Atlantic appears to be based on the proposition that there are criteria of proper judicial behavior which forbid reliance on the rule of *stare decisis* as the *sole* basis for decision. We assume, and we are sure rightly, that this Court's judicial behavior is an appropriate guide for the Federal District Courts. This Court has already indicated that in appropriate circumstances it is judicially proper both entirely to ignore the rule of *stare decisis* and to place sole reliance upon it, *Radovich* v. *National Football League*, U.S. , 25 Law Week 4152 (1957), regardless of what a tribunal's resolution of the subject controversy would be were it *res integra*.

VI. A requirement that a temporary license issue before a successor application is filed, if the pendency of the application is to suspend expiration of the license, does not delay the filing of certification applications, because by its rules the agency can require their "timely" filing to be an early one.

Pan-Atlantic also suggests that a decision which vacated Pan-Atlantic's temporary authority on the ground that it

was not a licensee at the time it applied for permanent authority would encourage postponement of permanent authority applications until after issuance of the temporary license; hence would frustrate any attempt by the Commission to speed the processing of such permanent authority applications. (Pan-Atlantic brief, pp. 16-17) It is our contention that the type of licensing to which section 9(b) of the Administrative Procedure Act is addressed does not include section 210a and section 311 temporary licenses under the Interstate Commerce Act. As thus construed, both section 9(b) of the Administrative Procedure Act and the decision in *Stone's Express* v. *United States*, 122 F.Supp. 955 (D., Mass., 1954) would produce no such result as Pan-Atlantic envisages. Moreover, the Interstate Commerce Commission from whom, as appellant, such an argument could more appropriately be heard, makes no such contention in the course of its discussion of the *Stone's Express* case. (I.C.C. brief, pp. 24-26) There is good reason for this restraint on the Commission's part. It recognizes that section 9(b) preserves existing licenses from expiration only in cases in which "timely" applications for renewals have been filed. The Commission is aware that what constitutes a "timely" application can be governed by agency rules and, in point of fact, is governed by Section 2.2(i) of the Commission's rules on the matter (Pan-Atlantic brief, Appendix C, p. 14a). There is nothing to prevent the agency from requiring that a renewal application be filed *one* day following the date on which the applicant acquires the status of licensee. The present allowance by Section 2.2(a) of the Commission's rules of 60 days following issuance of the temporary license does not comport with the urgency which Pan-Atlantic's argument says exists.

If it should be necessary to conclude (and we do not believe it is) that section 9(b) of the Administrative Procedure Act preserves temporary I.C.C. licenses from expiration

when they are *succeeded* by applications for permanent authority, all that can be said of the matter is that the Congress, while it evidently meant and desired to limit section 9(b)'s third sentence solely to license renewal situations, failed partially in that temporary certificates under sections 210a(a) and 311(a) of the Interstate Commerce Act can be extended under some circumstances, although it remains true that temporary approvals under sections 210a(b) and 311(b) cannot. In the event of such a construction it would be necessary simply for Congress to consider more precise language in an amendment to section 9(b) in order to achieve the goal it had in mind. Be that as it may, certainly a conclusion that the Congress had partially failed in fairly stating its intent in the legislation would not warrant a ruling that no element of that intent should be given effect.

Construed in conformity with the analysis set forth in this brief, however, section 9(b) gives no reason to differentiate between temporary licenses issued before and those issued after the filing of applications for permanent licenses because the third sentence is not applicable to temporary licenses of any nature except in circumstances where their periodic renewal is permissible.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX A

Docket Number	Date of Original 180 Day Order	Effective Date of Final Order	Duration of Temporary Authority Years	Months	Days
F-5205	6-5-52	12-26-52		6	23
F-5882	1-25-55	9-2-55		7	8
F-6108	11-7-55	7-16-56		8	9
F-5997	6-22-55	4-2-56		9	11
F-5201	5-5-52	3-11-53		9	25
F-5635	1-12-54	11-16-54		10	4
F-6116	11-3-55	9-10-56		10	7
F-5132	2-14-52	12-22-52		10	8
F-5811	11-8-54	9-28-55		10	20
F-5813	11-8-54	9-28-55		10	20
F-5700	5-20-54	4-29-55		11	9
F-6074	11-2-55	10-19-56		11	17
		* * *			
F-5756	9-21-54	9-28-55	1		7
F-5831	12-6-54	12-30-55	1		24
F-5083	12-26-51	11-26-53	1	1	
F-5941	3-16-55	4-16-56	1	1	
F-5847	12-15-54	1-26-56	1	1	11
F-5111	1-23-52	3-11-53	1	1	16
F-5845	3-18-55	5-7-56	1	1	19
F-5029	10-4-51	12-2-52	1	1	28
F-5030	10-4-51	12-2-52	1	1	28
F-4814	9-8-51	12-5-52	1	2	27
F-5379	1-22-53	4-19-54	1	2	28
F-5587	7-13-54	10-17-55	1	3	4
F-6071*	12-2-55	3-12-57	1	3	10
F-6136*	11-28-55	3-12-57	1	3	12
F-5908	2-15-55	6-1-56	1	3	17
F-6106*	11-22-55	3-12-57	1	3	18
F-5609	12-18-53	4-22-55	1	4	4
F-5905	2-16-55	6-25-56	1	4	9
F-6157	1-5-56	5-14-57	1	4	9
F-5921	3-16-55	8-1-56	1	4	16
F-5899	2-4-55	6-22-56	1	4	18
F-6000	7-1-55	12-5-56	1	5	4
F-5452	4-17-53	9-22-54	1	5	5

Docket Number	Date of Original 180 Day Order	Effective Date of Final Order	Duration of Temporary Authority Years	Months	Days
F-5556	1-21-54	6-27-55	1	5	6
F-5522	8-17-53	1-26-55	1	5	9
F-5143	2-20-52	8-7-53	1	5	18
F-5341	11-4-52	4-26-54	1	5	22
F-5809	10-26 54	4-18-56	1	5	23
F-6037	8-16-55	2-10-57	1	5	25
F-5735	7-9-54	1-4-56	1	5	27
		* * *			
F-6052	9-1-55	3-14-57	1	6	13
F-5622	12-29-53	7-13-55	1	6	14
F-5223	5-29-52	12-14-53	1	6	15
F-5703	7-6-54	2-21-56	1	7	15
F-5678	4-15-54	12-5-55	1	7	20
F-5674	4-15-54	12-5-55	1	7	20
F-5734	7-9-54	3-5-56	1	7	25
F-6005*	7-12-55	3-12-57	1	8	
F-4916	6-29-51	3-2-53	1	8	1
F-3300	9-26-51	6-1-53	1	8	6
F-5996*	7-6-55	3-12-57	1	8	6
F-5959	5-17-55	1-29-57	1	8	12
F-5830	11-30-54	8-15-56	1	8	16
F-5751	8-20-54	5-7-56	1	8	17
F-5774	9-23-54	6-26-56	1	9	3
F-5947	4-1-55	1-8-57	1	9	7
F-5799	10-15-54	8-6-56	1	9	22
F-5704	5-11-54	3-5-56	1	9	23
F-5438	6-5-53	4-4-55	1	9	30
F-5566	12-7-53	10-17-55	1	10	10
F-4927	7-5-51	5-21-53	1	10	16
F-5075	11-5-52	11-4-54	1	11	29
		* * *			
F-5117	1-30-52	2-1-54	2		2
F-5926*	3-4-55	3-12-57	2		8
F-5551	9-25-53	10-7-55	2		12
F-5904*	2-18-55	3-12-57	2		28
F-5718	6-9-54	7-19-56	2	1	10

Docket Number	Date of Original 180 Day Order	Effective Date of Final Order	Duration of Temporary Authority Years	Months	Days
F-5721	6-9-54	7-19-56	2	1	10
F-5541	10-5-53	12-15-55	2	2	10
F-5050	11-26-51	1-15-54	2	2	20
F-5211	6-26-52	10-1-54	2	3	5
F-5212	6-26-52	10-1-54	2	3	5
F-5210	6-26-52	10-1-54	2	3	5
F-5209	6-26-52	10-1-54	2	3	5
F-5406	2-17-53	6-1-55	2	3	15
F-5408	2-17-53	6-1-55	2	3	15
F-5563	12-18-53	4-16-56	2	3	29
F-5717	6-9-54	10-16-56	2	4	7
F-5036	10-31-51	4-19-54	2	5	19
F-4970	9-10-51	3-8-54	2	5	26
F-4969	9-10-51	3-8-54	2	5	26
		* * *			
F-5430	5-4-53	11-7-55	2	6	3
F-5666	4-7-54	12-27-56	2	8	20
F-5695*	4-23-54	3-12-57	2	10	17
		* * *			
F-5468	5-21-53	5-21-56	3		
F-4976	9-6-51	10-18-54	3	1	12
		* * *			
F-5080	12-18-51	11-14-55	3	10	27
F-5231	6-19-52	6-18-56	3	11	30
		* * *			
F-5407*	2-17-53	3-12-57	4		23
F-4819	5-9-51	7-20-55	4	2	11